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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1988

ALPHA BETA COMPANY, CAROLE COLE AND LYNNE COPPIN,

Petitioners,

vs.

RITA NAHM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT AND TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. May a state tort claim for intentional infliction of emotional distress be maintained where the allegations therein are inextricably intertwined with the collective bargaining agreement such that in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement containing a mandatory arbitration clause?

2. Is an employee excused from exhausting her contractual remedies under a mandatory arbitration clause because she has terminated her employment?

3. Is the decision of the California Supreme Court to "depublish" the published opinion of the District Court of Appeal a violation of the due process and equal protection clauses of the United States Constitution where the court's action is not based on any enunciated standard?[1]

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[1] Petitioner Alpha Beta Company is a wholly owned subsidiary of Alpha Beta, Inc., which is a wholly owned subsidiary of American Stores Company which is affiliated with the following companies: American Stores Realty Corp.; American Stores Properties, Inc.; American Stores Company (California); American Stores Diary Company; American Stores Management Systems Co.; A.S.C., Inc.; S.K.A., Inc.; Trans-West Air Service; Skaggs Alpha Beta, Inc.; Skaggs Companies, Inc.; Acme Markets, Inc.; and Jewel Companies, Inc. All subsidiaries of Alpha Beta Company are wholly owned.

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Petitioners, Alpha Beta Company, Carole Cole and Lynne Coppin (hereinafter collectively referred to as "Alpha Beta") respectfully pray that a writ of certiorari issue to review a decision of the California Court of Appeal for the First Appellate District entered on February 26, 1988 and a decision of the California Supreme Court entered on June 23, 1988.

CITATION TO OPINIONS BELOW

The decision of the California District Court of Appeal is unofficially reported at 244 Cal. Rptr. 414 (1988). This decision appears in Appendix "A", *infra* (App. 1-22.) The decision of the California Supreme Court denying Alpha Beta's petition for review and "depublishing" the Court of Appeal's decision appears in Appendix "B", *infra* (App. 23.)

JURISDICTION

The decision of the California District Court of Appeal was issued on February 26, 1988. A petition for review to the California Supreme Court was denied on June 23, 1988. This Petition for Writ of Certiorari was filed within ninety days of that date as provided for under 28 U.S.C. § 2101(c), and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185) provides in relevant part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The only constitutional provisions implicated are the Supremacy Clause (Art. VI, cl. 2.), and the Due Process and Equal Protection Clauses contained in the Fourteenth Amendment to the Constitution.

Relevant sections of Rules 976, 977 and 978 of the California Rules of Court are set forth in Appendix "C".

STATEMENT OF THE CASE

This matter is before this Court for a second time. This Court previously vacated a decision issued by the California Court of Appeal almost identical to the one now subject to this petition for certiorari. *Alpha Beta Company v. Superior Court of California*, 472 U.S. 1004, 105 S.Ct. 2696 (1985). Notwithstanding this Court's remand order, and a second remand order from the California Supreme Court (see discussion *infra*, p. 7), the Court of Appeal adamantly continues to adhere to its ill-considered preemption analysis and permits a state tort claim

for intentional infliction of emotional distress to be maintained though *each of the allegations upon which the complaint is premised is a breach of a collective bargaining agreement and though the plaintiff has failed to exhaust her arbitral remedies.*

A. THE UNDISPUTED FACTS.[2]

Alpha Beta operates a chain of retail supermarkets. Rita Nahm (hereinafter "Nahm") was employed by Alpha Beta as a bakery clerk and covered by a collective bargaining agreement negotiated by the United Food and Commercial Workers Union, Local 870. This collective bargaining agreement contained provisions governing discrimination, seniority, overtime, the right to transfer, the issuance of oral and written warnings, and all other conditions governing the terms of Nahm's employment with Alpha Beta. Any alleged violation of these contractual provisions, *including the arbitrability of any grievance,* was subject to a mandatory grievance and arbitration clause.[3]

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[2] The factual record is undisputed and is based on the Complaint, answers to interrogatories, and the declaration of Alpha Beta's Director of Labor Relations. In opposing Alpha Beta's motion for summary judgment, Nahm did not file any counter-declarations, nor did she controvert any of the facts underlying the motion.

[3] The collective bargaining agreement provides in relevant part:

"18.1 For the purpose of this Agreement, a grievance is a dispute, difference of opinion between the parties, and grievances of employees involving or arising out of the

(Continued on following page)

Six months after voluntarily terminating her employment with Alpha Beta, Nahm filed a complaint in the California Superior Court alleging a single cause of action for intentional infliction of emotional distress. Each of the allegations upon which Nahm's tort claim is based is potentially a breach of the collective bargaining agreement. In this regard, Nahm's complaint alleges *in toto*:

> Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others, causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastising her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store.

(App. 3.)

(Continued from previous page)

> meaning, interpretation, application or alleged violation of this Agreement, *including the arbitrability of all such matters*. All grievances as defined are to be processed in accordance with the terms of this section."

(Emphasis added.)

Notwithstanding the contractual basis underlying each of these allegations, Nahm filed only one grievance against Alpha Beta. On February 27, 1982, Nahm was issued a written warning for insubordination. Nahm immediately filed a grievance contending that the warning was improper under the contract. A Board of Adjustment, as provided for by the collective bargaining agreement, was convened to adjudicate this grievance. The Board took evidence, heard argument, and "deadlocked" on the issue of whether the warning was proper. Neither Alpha Beta nor the Union chose to pursue the matter further, though the Union reserved the right to arbitrate the validity of the warning if Alpha Beta used it to support further disciplinary action against Nahm. Nahm conceded in her response to Alpha Beta's interrogatories that it is this warning upon which she relies for the allegation in her complaint that Alpha Beta made "false statements in [her] personnel file to make it look as if [she] was being insubordinate to superiors."

Though the complaint, above quoted, sets forth numerous other potential violations of the collective bargaining agreement, no other grievance was ever filed by Nahm against Alpha Beta. Nahm *never* asserted, *through the grievance process*, that Alpha Beta (1) denied her the right to transfer; (2) reduced her hours of work; (3) required her to do the work of others; (4) issued her an oral warning for working overtime; (5) violated her seniority rights; or (6) discriminated against her. Yet each of these matters is covered by the collective bargaining agreement and any violation thereof is subject to the contractual arbitration procedure.

B. PROCEDURAL HISTORY.

In response to the complaint, Alpha Beta moved for summary judgment on the defenses raised in its answer asserting that the tort claim was preempted under federal law. (App. 4.) When the motion was denied, Alpha Beta filed a petition for writ of prohibition, or in the alternative, mandate with the California District Court of Appeal. On March 16, 1984, the Court of Appeal denied the petition, without comment.

Alpha Beta then petitioned the California Supreme Court for a hearing. By order dated April 19, 1984, the California Supreme Court granted the petition and immediately retransferred the matter to the Court of Appeal with directions to issue an alternative writ citing *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 429 (9th Cir. 1983). Subsequently, the Court of Appeal issued a decision discharging the alternative writ and denying the petition for a preemptory writ. *Alpha Beta, Inc. v. Superior Court*, 160 Cal.App.3d 1049, 207 Cal. Rptr. 117 (1984). After the California Supreme Court denied Alpha Beta's petition for a hearing, Alpha Beta filed a petition for writ of certiorari with this Court.

On June 10, 1985, this Court granted Alpha Beta's petition for certiorari, vacating the decision of the Court of Appeal and remanding the case for reconsideration in light of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985). *Alpha Beta Company v. Superior Court of California, supra.*

Almost one year later, the Court of Appeal reissued its original decision adding an introductory paragraph setting forth the case's procedural history and adding a

footnote finding *Allis-Chalmers* to be inapplicable. *Alpha Beta, Inc. v. Superior Court,* 225 Cal. Rptr. 551 (1986). Subsequently, the California Supreme Court granted Alpha Beta's petition for review and then transferred the case back to the Court of Appeal for reconsideration, citing *Allis-Chalmers v. Lueck, supra; DeTomaso v. Pan American World Airways, Inc.,* 43 Ca1.3d 517 (1987); *Friday v. Hughes Aircraft Co.,* 188 Cal.App.3d 117 (1986); and *Truex v. Garrett Freight Lines, Inc.,* 784 F.2d 1347 (9th Cir. 1985).

Slightly less than a year later, the Court of Appeal chose to reissue its modified decision adding text to distinguish the various cases cited by the California Supreme Court in its remand order. (App. "A".) Alpha Beta then petitioned the California Supreme Court for review. On June 23, 1988, the California Supreme Court denied Alpha Beta's petition for review and simultaneously directed that the Court of Appeal's decision not be officially reported. (App. "B".)

By letter dated September 7, 1988, Alpha Beta, pursuant to Rule 978 of the California Rules of Court, requested the California Supreme Court to reverse its order "depublishing" the Court of Appeal's decision. No action has been taken on this request.

C. THE FINALITY OF THE DECISION.

The California District Court of Appeal's decision on the Section 301 preemption issue is the law of this case and final for the purposes of 28 U.S.C. § 1257. It "finally disposed of the federal preemption issue . . . " and the decision is not subject to further state court review.

Belknap, Inc. v. Hale, 463 U.S. 491, n. 5, 103 S.Ct. 3172 (1983). The order of the California Supreme Court "depublishing" the Court of Appeal's decision is not subject to further state court review.

II

REASONS FOR GRANTING THE WRIT

A. PREEMPTION IS REQUIRED WHERE A TORT ACTION REQUIRES ADJUDICATION OF A COLLECTIVE BARGAINING AGREEMENT.

For a quarter of a century, rights created by a collective bargaining agreement have been governed by and enforceable exclusively under federal law, in particular Section 301 of the LMRA. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In conformity with stated congressional policy (29 U.S.C. § 173(d)), this Court has established private arbitration, where agreed upon, as the *exclusive* method for adjudicating disputes that arise under a collective bargaining agreement. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

The application and interpretation of a collective bargaining agreement are at the core of Nahm's tort claim. The propriety of Alpha Beta's actions vis-a-vis Nahm can only be resolved by reference to the collective bargaining agreement. Did Alpha Beta deny Nahm a transfer; did Alpha Beta deny Nahm full-time work; did Alpha Beta improperly discipline Nahm; did Alpha Beta violate the contractual seniority provisions; did Alpha Beta improperly discipline Nahm? The answers to these and similar

questions can only be found in the collective bargaining agreement.[4]

This Court has repeatedly and expressly held that if the policies animating Section 301 are to be given their proper range, the preemptive effect of Section 301 extends to any state law suit, whether in contract or tort, which would require for its resolution interpretation of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1911 (1985); *see also IBEW v. Hechler*, 481 U.S. ___, 107 S.Ct. 2161 (1987) and *Lingle v. Norge Div. of Magic Chef, Inc.*, ___ U.S. ___, 108 S.Ct. 1877 (1988).

Though *Allis-Chalmers, Hechler,* and *Lingle* did not deal with the state law tort of intentional infliction of emotional distress, the analysis to be applied is obviously identical. " . . . [I]f the resolution of a state law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles – necessarily uniform throughout the nation – must be employed to resolve the

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[4] In any event, the undisputed factual record removed this issue from contention. The uncontroverted evidence was that each of the incidents alleged in Nahm's complaint constituted grievable events. The District Court of Appeal expressly recognized as much in acknowledging that " . . . the various incidents alleged by Nahm may be separately grievable under the agreement . . . " (App. 13.)

dispute." *Lingle v. Norge Div. of Magic Chef, Inc., supra,* 108 S.Ct. at 1881.

The Ninth Circuit Court of Appeals recently addressed this exact issue. In *Miller v. AT&T Network Systems,* 850 F.2d 543 (9th Cir. 1988), the court noted that by its very nature a tort claim for emotional distress places into issue "the appropriateness of the defendant's behavior [and therefore] the terms of the collective bargaining agreement become relevant in evaluating whether the defendant's behavior was reasonable. Actions that the collective bargaining permits might be deemed reasonable in virtue of the fact that the CBA permits them." *Id.* at 550. Since the emotional distress claim requires consideration of the reasonableness of the employer's behavior, which in turn depends on whether the employer's behavior violated the collective bargaining agreement, preemption is required. *Id. See also Truex v. Garrett Freight Lines, Inc., supra*[5]; *Newberry v.*

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[5] *Truex* is particularly applicable because the complaint at issue also dealt with workplace grievances and, like Nahm, did not involve an accompanying claim of wrongful termination. In fact, there is an almost one-to-one correspondence between Nahm's allegations and those present in *Truex*. Truex claimed emotional distress based on the following allegations: "(1) Garrett issued unjustified warning letters criticizing Appellants' conduct during work hours; (2) Appellants' supervisors engaged in excessive surveillance of Appellants during working hours for the purpose of harassing them; (3) Appellants' supervisor used abusive language toward them; (4) Appellants' supervisors attempted to bribe other employees to, set up, Appellants for termination; and (5) Appellants' work duties were reassigned for no legitimate purpose." 784 F.2d at 1350.

Pacific Racing Ass'n., ___ F.2d ___ (9th Cir. 1988); *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984); *Michigan Mutual Ins. Co. v. Steelworkers*, 774 F.2d 104 (6th Cir. 1985); and *Strachen v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985).

Similarly, it is impossible to adjudicate Nahm's complaint without resort to the collective bargaining agreement to ascertain whether Alpha Beta's actions were *required by or in contravention* of that agreement. As found by the District Court of Appeal:

> Undeniably the collective bargaining agreement will be implicated but only as it may have been used or disregarded in the course of the alleged "episodes and encounters designed to harass, humiliate and upset plaintiff."

(App. 19.)

To examine one of the more glaring examples, Nahm complains that Alpha Beta harassed her by denying her a transfer to another store. Yet, Section 4.9 of the collective bargaining agreement specifically governs the right of an employee to obtain a transfer providing in relevant part: "Requests for transfer . . . will be given proper consideration, and will not be refused arbitrarily." Clearly, then, an examination of Alpha Beta's alleged refusal to transfer Nahm requires the court or jury to ascertain Alpha Beta's obligation to Nahm under the contract. If a court or jury is permitted to make such an inquiry, the uniformity of contractual interpretation which *Lincoln Mills* was intended to establish will disappear. Alpha Beta's contractual obligations will turn on the whims of the particular jurors who are called upon to determine these issues in the context of adjudicating the employee's tort claim.

Nonetheless, the District Court of Appeal rejects the *Allis-Chalmers* analysis determining that this Court's holding was "one of narrow focus". Relying on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Farmer v. Carpenters*, 430 U.S. 290 (1977), the court allows the complaint to be maintained because "Nahm's claim is a straightforward state-law tort action for emotional distress caused by intentional, outrageous conduct [and] [r]ecovery is based on Nahm's right, independent of contract, to be free from conduct so reprehensible that 'no reasonable [person] in a civilized society should be expected to endure it.' " (Emphasis deleted.) (App. 14.)

The District Court of Appeal's reasoning confuses applicable preemption principles. *Garmon* deals with preemption under the National Labor Relations Act and whether the conduct at issue is arguably protected or prohibited by that Act. *Garmon* has no applicability to preemption analysis under Section 301. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102, n. 9 (1962); and *see also Allis-Chalmers v. Lueck, supra*, n. 9. Thus, it has been expressly held that the *Farmer* exception to the Garmon preemption doctrine is inapplicable to the *Allis-Chalmers* analysis. *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988) (" . . . we limited *Farmer* to cases under the NLRA."); *see also Vincent v. Trend Western Technical Corp.*, 828 F.2d 563 (9th Cir. 1987); and *Newberry v. Pacific Racing Ass'n., supra.*

Moreover, contrary to the District Court of Appeal's analysis, it is irrelevant that Nahm has pled "a straightforward state-law tort action for emotional distress" which is premised on a state right independent of contract. By definition, tort claims are independent of contractual rights. The Court of Appeal's analysis elevates

form over substance. The *critical inquiry* is whether resort to the collective bargaining agreement is necessary to adjudicate the claim presented. Thus, it does not matter whether California has established a state law right to be free of emotional distress, but rather, whether adjudication of that right will require interpretation of a collective bargaining agreement.

> Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is non-negotiable and applies to unionized and non-unionized workers alike. While it may be true that most state laws that are not pre-empted by § 301 will grant non-negotiable rights that are shared by all state workers, we note that neither condition ensures non-preemption. It is conceivable that a state could create a remedy that, although non-negotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301.

Lingle v. Norge Div. of Magic Chef, Inc., supra, n. 7.

Simply stated, Nahm's complaint for emotional distress is based on actions that arose out of her employment relationship with Alpha Beta. Alpha Beta's actions vis-a-vis Nahm were governed by a collective bargaining agreement. To adjudicate Nahm's complaint, resort must necessarily be had to the collective bargaining agreement, and thus, preemption is mandated.

B. NAHM WAS REQUIRED TO EXHAUST HER CONTRACTUAL REMEDIES.

Though the District Court of Appeal concedes that the collective bargaining agreement is implicated and that Nahm could have pursued her remedies under that

agreement, it excuses her failure to do so because her employment with Alpha Beta has terminated.

> In terms of the policies underlying the exhaustion doctrine, it is too late in this case to hope for a simple, expeditious and yet adequate disposition of Nahm's complaints or "to foster more harmonious employee-employer relations." Nahm is no longer an employee, and the relief which might have been available to her, as an employee, by way of the arbitration procedure – correction of allegedly improper entries in her personnel file, for example – would be all but meaningless, to her or to the labor-management relationship at Alpha Beta, now.

(App. 19-20.)

It is unbelievable that after twenty years of developed labor law, the District Court of Appeal could create an exception expressly rejected by this Court. The very case establishing the exhaustion doctrine, *Republic Steel Corp. v. Maddox, supra,* involved an employee who had left his employment more than three years prior to initiating suit. Focusing on the harm to the management-union relationship, this Court required exhaustion. " . . . [T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." 379 U.S. at 653. *See generally* Morris, *The Developing Labor Law* (2d ed. 1983) pp. 1294-1299.

The resolution of Nahm's complaints will have a serious impact on other Alpha Beta employees. Whether Alpha Beta has a right to require overtime, issue written warnings, deny transfers, is a matter of continuing and vital interest to thousands of employees working for Alpha Beta. By focusing on Nahm alone, the District

Court of Appeal loses sight of the important role arbitration plays in preserving stable labor-management relations. The exhaustion doctrine ensures that a disgruntled employee cannot disrupt that relationship without first attempting to resolve any dispute within the framework provided for by the parties. The exception created for Nahm would swallow the exhaustion rule. In every case in which the employment relationship has terminated, the District Court of Appeal's rationale would permit an employee to avoid arbitration. The exception cannot be left to stand.

C. THE DEPUBLICATION ORDER DEPRIVES ALPHA BETA OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The flaws in the District Court of Appeal's decision are readily apparent. However, rather than addressing the merits of the decision, the California Supreme Court denied Alpha Beta's petition for review and chose to "depublish" the opinion. Under Rule 976(c)(2) of the California Rules of Court, the California Supreme Court is empowered to order an opinion previously certified for publication not to be published.[6] The effect of the court's depublication order is to prevent the now unpublished decision from being cited as precedent. California Rules of Court, Rule 977(a). Thus, the California Supreme Court

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[6] The California Supreme Court's authority to depublish an opinion stems from Article VI, Section 14 of the California Constitution, which provides "for the prompt publication of such opinions . . . as the Supreme Court deems appropriate . . . "

has effectively barred the decision from serving as precedent while at the same time forcing Alpha Beta to litigate a state claim which is unquestionably preempted by federal law.

Though the California Supreme Court has established standards for determining when an appellate opinion should be published (Rule 976(b)), no analogous standard has been established regulating the Supreme Court's authority to depublish a decision. The California Supreme Court has unfettered discretion in determining which court of appeal decisions to depublish. The power to depublish an already published decision stands in stark contrast to the more usual practice of issuing a nonpublishable opinion in the first instance, a practice common to both the federal and state courts.

This Court has never addressed the right of an appellate court to depublish a published decision or to do so in the absence of any enunciated standard. This appellate practice has been the subject of widespread critical comment. *See generally* Gernstein, "Law by Elimination: depublication in the California Supreme Court", 7 *Judicature* 293 (1984); Biggs, *Censoring the Law in California: decertification revisited*, 30 The Hastings Law Journal 1577 (1979); and Notes, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 So. Calif. Law Rev. 1181 (1977). Even those who defend the practice acknowledge, at a minimum, the need for enunciated standards for its use. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. Law Rev. 514 (1984).

The California Supreme Court's practice of *depublishing previously published decisions* raises serious constitutional issues. As stated by one commentator, depublication has turned into a process of covert substantive review:

> Depublication becomes, quite literally, an alternative to a full-scale substantive review; in fact it has become a *form of substantive review*. The injection of substantive issues into depublication decisions is facilitated by the rule's failure to state any limits on the supreme court's capacity to decide what not to publish, and the constitution's grant to the court of authority to make such publication decisions as it "deems expedient".

(Original emphasis; footnotes omitted.) Gernstein, p. 296.

The practice denies litigants the very benefit that the doctrine of *stare decisis* was intended to grant. See, e.g., *Vasquey v. Hillery*, 474 U.S. 254, 265-266, 106 S.Ct. 617 (1986). The law varies depending on whether a particular opinion is published. Identical litigants are treated differently.

> . . . [I]f the doctrine of precedent encapsulates the right to have like cases treated alike, then it follows that the courts' application of general standards embodied in the published opinions alone cannot guarantee fair treatment. Lawyers must be able to see just how like cases are being decided, and be able to cite those cases to the courts they come before in order to ensure that justice is being done evenhandedly.

Gernstein, p. 295 (footnote omitted).

The present case presents a classic example of the deleterious effect of the California Supreme Court's unbridled discretion to depublish opinions. Alpha Beta is

required to litigate a tort claim – through the expedient mechanism of depublication – that no other employer is, or would be, required to litigate. The only reason Alpha Beta is placed in this position is because its legal obligation to litigate this claim will not affect any other employer. Depublication subjects Alpha Beta to a rule of law governing no one else. It therefore deprives Alpha Beta of the equal protection of the laws as well as due process.

Moreover, this result occurs in the absence of an articulated standard. The California Supreme Court has not set forth any standard under which any opinion, *having met the articulated standard for publication,* is then depublished. The District Court of Appeal's decision, while wrong, "applies an existing rule to a set of facts significantly different from those stated in published opinions . . . " and thus qualifies for publication under Rule 976(b)(l). While it may be expedient for the Supreme Court to depublish the decision, "justice for [Alpha Beta] required a hearing of the case, not deletion of the opinion." Biggs, p. 1593.

Because the Supreme Court's depublication order is made in the dark without any articulated judicial standard, the practice is fundamentally lawless. At a minimum, the California Supreme Court should be required to specify the reasons why a given opinion is depublished. Absent any standard, the process denies litigants their right to effective and meaningful appellate review.

The California Supreme Court is allowed to hide, if not bury, the judicial mistakes which come before it.[7]

III

CONCLUSION

For the aforementioned reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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[7] Pursuant to Rule 978(a), Alpha Beta requested that the California Supreme Court reverse its depublication order and permit the opinion issued by the District Court of Appeal to be published asserting, in part, that constitutional due process and equal protection considerations required publication. As provided by Rule 978, the request was made by letter to the Chief Justice of the California Supreme Court.

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALPHA BETA, INC. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,
Respondent,

RITA NAHM,
Real Party in Interest
_____/

A025458

Alameda Co.
Super. Ct. No. H-85473-9

Rita Nahm was employed by Alpha Beta, Inc., from May 1980 through February 1982, and throughout that period was subject to a collective bargaining agreement between Local 870, Retail Clerks Union AFL-CIO, and Alpha Beta. Several months after her employment terminated Nahm sued Alpha Beta and its supervisory employees Cole and Coppin, in respondent superior court, for damages for intentional infliction of emotional distress. Defendants moved for summary judgment upon the theory that Nahm's tort action in respondent court was preempted by federal labor law. Respondent court denied defendants' motion; defendants petitioned this court for a writ of prohibition or mandate; we summarily denied the petition.

The California Supreme Court granted hearing and retransferred the matter to us with directions to issue an alternative writ, referring to *Beers v. Southern Pacific Transp. Co.* (9th Cir. 1983) 703 F.2d 425. We issued the alternative writ, heard oral argument, and concluded that respondent court's order was correct. In an opinion filed October 16, 1984, we vacated the alternative writ and denied the peremptory writ. The California Supreme Court denied review. The United States Supreme Court granted certiorari and remanded the case with directions that we reconsider our opinion in light of *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202. We reconsidered the matter and concluded, for the reasons set forth *infra*, that the holding of *Allis-Chalmers* did not affect our result. Accordingly, we reissued our original opinion denying the peremptory writ, with the addition of a brief explanation of our reasoning concerning the *Allis-Chalmers* opinion.

The California Supreme Court subsequently granted review. At the same time, the court granted review in *Friday v. Hughes Aircraft Co.* (1986) 188 Cal.App.3d 117. Upon finality of the court's subsequent decision in *De Tomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, the court dismissed the grant of review in *Friday* as improvidently granted and retransferred the *Alpha Beta* case to this court. We were directed to reconsider our opinion in light of *Allis-Chalmers, De Tomaso,* the reinstated opinion in *Friday,* and *Truex v. Garrett Freight-Lines, Inc.* (9th Cir. 1985) 784 F.2d 1347. We have again reconsidered the matter, in light of the authority to which we have been referred, and we again conclude Alpha Beta's petition should be denied. We again reissue our

original decision, as modified by a discussion of the authorities provided by the Supreme Court.

Nahm's complaint in respondent court alleged in pertinent part that "[a]t all times herein mentioned, defendant . . . COLE was the assistant store manager of the above mentioned Alpha Beta store. At all times herein mentioned, defendant . . . COPPIN was the manager of the bakery of the above mentioned Alpha Beta store. Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as Plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking Plaintiff to stay on and work overtime and then verbally abusing and chastising her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store." The complaint further alleges that each defendant acted in all relevant respects as the agent of each other defendant, and that the described conduct was "outrageous" and caused Nahm emotional injury for which she is entitled to both compensatory and punitive damages.

There is no indication in the record before us that Nahm's allegations are in any way related to the termination of her employment.

Defendants moved for summary judgment on the sole ground "that the Complaint herein fails to state a cause of action against defendants in that it is preempted by federal law." In support of their motion defendants placed before the court the collective bargaining agreement, calling attention to its provision for processing "grievances" by voluntary adjustment or arbitration. The collective bargaining agreement defines a "grievance" as "a dispute, difference of opinion between the parties, and grievance of employees involving or arising out of the meaning, interpretation, application or alleged violation of this Agreement, including the arbitrability of all such matters." By the declaration of Alpha Beta's director of industrial relations defendants asserted that "[e]ach and every one of these incidents could have been the subject of a grievance and processed through the grievance and arbitration procedure contained in . . . the collective bargaining agreement." Thus, defendants argued, "plaintiff's complaint is preempted by federal law in that the allegations therein constitute a single claim for breach of a collective bargaining agreement, the exclusive remedy for which is the grievance and arbitration provision contained in said agreement."

Nahm filed only legal argument in opposition. Respondent court denied defendants' motion. This writ petition followed. The only issue before this court is whether defendants' uncontradicted showing is sufficient to demonstrate as a matter of law that Nahm's claim cannot be maintained in a California trial court at this

time. (Cf. *LaRosa v. Superior Court* (1981) 122 Cal.App.3d 741, 744-745.)

Defendants identify two "questions presented for review":

"1. Does federal law preempt a state tort claim based on allegations identical to grievable events under a collective bargaining agreement?

"2. Can a state tort claim be maintained where in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement?"

As stated and argued by defendants, these questions compound elements of two doctrines: Federal preemption (cf. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 242, 243; *Sarro v. Retail Store Employees Union* (1984) 155 Cal.App.3d 206, 214-216) and exhaustion of contractual arbitration procedures (*Johnson v. Hydraulic Research & Mfg. Co.* (1977) 70 Cal.App.3d 675, 679; cf. Labor Management Relations Act § 203(d) (29 U.S.C. § 173, subd. (d)); *Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564, 568).

We conclude that defendants' reliance on the rhetoric of federal preemption decisions is misplaced.

Defendants cite several cases decided under the Railway Labor Act (RLA) (45 U.S.C. § 151 et seq.). But to the extent that this action is affected at all by federal labor law, it is subject not to the RLA but rather to the general provisions of the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) (29 U.S.C. § 141 et seq.).

The RLA expressly provides for administrative determination of disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." (45 U.S.C. § 153, subd. *First*(i).) It is now well established that these procedures are compulsory, and exclusive of judicial proceedings, in any dispute subject to the RLA. (*Andrews v. Louisville & Nashville R. Co.* (1972) 406 U.S. 320, 322-326; *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367, 1369-1370, cert. den. 439 U.S. 930.) "[T]he compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself . . . ." (*Andrews v. Louisville & Nashville R. Co., supra,* 406 U.S. at p. 323.) Our attention has been directed by our Supreme Court to *Beers v. Southern Pacific Transp. Co., supra,* (9th Cir. 1983) 703 F.2d 425 which we had rejected as inapplicable to this case when we summarily denied defendants' petition. Beers, employed under the terms of a collective bargaining agreement subject to the RLA, was discharged for alleged insubordination arising out of union activities. His state-court action for intentional infliction of emotional distress and violations of his rights under the RLA was removed to federal district court where summary judgment for defendants was granted on the ground that the court lacked subject-matter jurisdiction. The Court of Appeals affirmed the district court's finding that the controversy was "a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act" (703 F.2d at p. 429), relying on *Magnuson v. Burlington*

Northern, Inc., supra, which in turn followed *Andrews v. Louisville & Nashville R. Co., supra.*

The NLRA and LMRA contain no provision directly comparable to "the exclusive . . . grievance mechanisms" of the RLA. Section 203(d) of the LMRA (29 U.S.C. § 173, subd. (d)) does provide that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement," and the declaration that arbitration of grievances is "the very heart of the system of industrial self-government" (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 581) has been often reaffirmed. But "the difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection, 29 U.S.C. §§ 157-158. Often . . . it is the objective of certain conduct, rather than the mere exercise thereof, that is relevant to determining whether actions are protected or prohibited by the NLRA. In contrast, the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act . . . . It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA." (*Jackson v. Consolidated Rail Corp.* (7th Cir. 1983) 717 F.2d 1045, 1052, cert. den. 465 U.S. 1007; cf. also *Andrews v. Louisville & Nashville R. Co., supra,* 406 U.S. at p. 323.) This distinction is historically explicable: The RLA provisions for mandatory administrative processing of minor disputes were part of a mechanism "designed to

serve the stated purposes of the Act which were, among others: 'To avoid any interruption to commerce or to the operation of any carrier engaged therein'. . . ." (*Machinists v. Central Airlines* (1963) 372 U.S. 682, 687-689; cf. also *Majors v. U. S. Air, Inc.* (D. Md. 1981) 525 F.Supp. 853, 855 ("[o]ne of the primary purposes of the Act is to minimize interruptions in the nation's transportation services by strikes and labor disputes".) No similar perceived need for swift determination of minor disputes has been associated with the NLRA or LMRA.

In sum defendants' RLA cases, in general, and *Beers v. Southern Pacific Transportation Co., supra,* are not dispositive in the circumstances of record here.

Nor do defendants make a persuasive case for preemption under the leading judicial decisions in the NLRA/LMRA context. Most such decisions involve attempts in state courts to assert claims based upon alleged conduct which would constitute a violation of NLRA section 7 or an unfair labor practice under NLRA section 8. The basic principles were spelled out in *San Diego Unions v. Garmon, supra,* 359 U.S. 236: "[C]ongress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . . . [¶] When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. [Fn. omitted.] However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism

but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely Peripheral concern of the Labor Management Relations Act. [Citation.] Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [Fn. omitted.] [¶] When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . , or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . . [¶] . . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (359 U.S. at pp. 242-245.)

The limits of *Garmon*'s preemption rule were further explored in *Farmer v. Carpenters* (1977) 430 U.S. 290. Farmer's decedent, Hill, had been an officer of the carpenters' union local. He sued the union on various theories including intentional infliction of emotional distress. The California superior court permitted the emotional distress count to go to the jury, which awarded actual and punitive damages. A Court of Appeal reversed on the ground of preemption, holding "that the state courts had

no jurisdiction over the complaint since the 'crux' of the action concerned employment relations and involved conduct arguably subject to the jurisdiction of the National Labor Relations Board." (430 U.S. at p. 295.) The California Supreme Court denied hearing, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded, concluding in relevant part that Hill's claim was not preempted. The United States Supreme Court reiterated *Garmon*'s qualifications to the preemption rule for matters of "merely peripheral concern" and matters sufficiently "deeply rooted in local feeling" and added that "[w]e also have refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' [Citations.]" (430 U.S. at pp. 296-297.)

Applying these principles to Hill's claim, the United States Supreme Court noted that "there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it,' " and that California, "on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury . . . ." (430 U.S. at p. 302.) "Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to

sustain mental distress. [Citations.] The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities [in violation of NLRA § 8(b)]." (430 U.S. at p. 304.) The United States Supreme Court then qualified its position: "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . . . . Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." (430 U.S. at p. 305.)

These principles appear to be applicable to Nahm's claim against defendants. The question whether Nahm's damage claims, asserted after her employment has terminated for reasons apparently unrelated to the claims, should be arbitrated under the collective bargaining agreement can fairly be characterized as of peripheral concern to the LMRA. No protected activity or unfair labor practice is implicated. Because Nahm's employment has terminated the value to her of remedies available through the arbitration process is problematic at best; to force arbitration in this case could advance the policy goals of federal labor law in only the most abstract sense. At the same time, Nahm appears to have pleaded an orthodox case for recovery under California law for the tort of intentional infliction of emotional distress which is, as the United States Supreme Court recognized in

Farmer, a matter of legitimate local concern. (Cf., e.g., *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497-498.)

We conclude that the preemption doctrine as stated in *Garmon* and qualified in *Farmer* does not bar state court action under the circumstances of the record before us. We adhere to this conclusion after reconsideration of the more recent authorities to which we have been referred.

The United States Supreme Court directed us to reconsider our decision in light of *Allis-Chalmers v. Lueck, supra*, 471 U.S 202. That case involved a state-law tort action for bad-faith handling of a disability insurance claim filed by an employee under an employer-provided health plan governed by a collective bargaining agreement. The court held the state-law action was preempted by federal law, specifically section 301 of the LMRA which provides for federal resolution of "suits for violation" of collective bargaining agreements. According to the *Allis-Chalmers* court, the preemptive effect of section 301 is based on the need for the stability provided by a uniform body of law governing labor contract interpretation. "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." (*Allis-Chalmers v. Lueck, supra*, 471 U.S. at p. ___, quoting *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103.)

From this premise the court reasoned that the Policy of uniform interpretation should not be limited to suits for breach of labor contracts, but should extend to any

suit whose resolution necessarily involved the interpretation of contract terms and phrases or rights and remedies "rooted in" or "derivative" of the contract. The employee's bad-faith tort action was therefore preempted by federal law, because it could not be resolved without analysis of the terms of the labor contract and the conduct of the parties thereto – specifically, whether the employer was under an implied contractual obligation to provide disability payments in a timely manner and whether the employer's conduct breached that obligation. Thus, the employee's action was "inextricably intertwined with consideration of the terms of the labor contract . . . [and the] state law [on which it was based] purport[ed] to define the meaning of the contract relationship." (471 U.S. at p. ___.)

Allis-Chalmers admits its holding is one of "narrow focus." (*Id.* at p. ___.) The court reiterated the long-standing rule that not every state suit "asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted under § 301." (*Ibid.*). Actions involving state rights and obligations which exist independently of contract, not subject to alteration or qualification by the process of negotiation, are not preempted. (*Ibid.*)

Although the case before us arises from an employment context and involves the parties to a collective bargaining agreement, Nahm's claim for emotional distress is not preempted under the narrow holding of *Allis-Chalmers*. While the various incidents alleged by Nahm may be separately grievable under the agreement, the crux of the lawsuit is a pattern of outrageous emotional

harassment which is outside the scope of preemption. Unlike the employee in *Allis-Chalmers*, Nahm does not complain of an instance of employer misconduct allegedly violating a contractual provision of a bargaining agreement. Rather, Nahm's claim is a straightforward state-law tort action for emotional distress caused by intentional, outrageous conduct. Recovery is based on Nahm's right, *independent of contract*, to be free from conduct so reprehensible that "no reasonable [person] in a civilized society should be expected to endure it." (*Farmer v. Carpenters, supra*, 430 U.S. at p. 302.) The allegations fall outside the bounds of civilized employer behavior and thus are not "inexplicably intertwined" with interpretation of a labor contract. This conclusion is fully consistent with *Allis-Chalmers* court's own limitations of its holding.

This conclusion also withstands our second invitation to reconsider the matter, by the California Supreme Court. Our view of this case in light of *Allis-Chalmers* has just been discussed; the remaining three cases do not compel a contrary result.

In *Friday*, the employee brought a cause of action for emotional distress based on a "general pattern of harassment, [including an] assignment to work in an unventilated room with chemical fumes and a damp floor." (*Friday v. Hughes Aircraft Co., supra*, 188 Cal.App.3d at p. 124.) Friday did not allege outrageous treatment unrelated to workplace issues but which happened to occur on the job; rather, he alleged treatment in retaliation for his complaints about dangerous handling of toxic chemicals, and a pattern of harassment designed to provoke him into quitting. (*Id.* at p. 120.) Significantly, this alleged

pattern was not outrageous conduct beyond the pale of civilized behavior, but direct complaints "about matters covered in the collective bargaining agreement: safety, unfair work assignments, work restrictions and denials of promotion and overtime. Evaluation of [Friday's] claim will necessarily involve reference to the relevant sections of the agreement to determine the parties' rights under it." (*Id.* at p. 125.)

In *Truex*, the employee brought a distress claim based on excessive surveillance, abusive language, unjustified reassignments or work duties and "set ups" for termination. The Ninth Circuit found the cause of action preempted because the employer's conduct was covered by a collective bargaining agreement that specified how and when employee discipline was to be administered: the plaintiff's tort claim was a thinly-veiled claim "that administration of discipline was improper under the standards set by the collective bargaining agreement." (784 F.2d at p. 1350.) The court also found the conduct was *not* so extreme as to be outrageous and therefor outside the ambit of federal preemption.

Like *Friday*, *Truex* is distinguishable: Nahm's allegations involved gross conduct which is not "discipline" but simply uncivilized treatment. It may be noteworthy that the collective bargaining agreement is not described by Alpha Beta as governing the imposition of discipline, but only as making any employee dispute grievable. In *Tellez v. Pacific Gas and Elec. Co., Inc.* (9th Cir. 1987) 817 F.2d 536, the Ninth Circuit found a distress cause of action was not preempted where the complained-of conduct (circulation of a suspension letter falsely accusing

the employee of selling cocaine on the job) was not governed by the collective bargaining agreement. In so doing the court distinguished *Truex*, where the agreement was "[specific] when and how discipline could be administered." (817 F.2d at p. 539.) "Unlike the agreement[] in *Truex* . . . , the present agreement is silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters. Accordingly, examination or interpretation of the agreement would not help to resolve Tellez's [sic] claim." (*Ibid.*)

Finally, nothing in *De Tomaso* dictates a different result. The Supreme Court has referred us to pages 528 and 529 of the *De Tomaso* opinion, which essentially restates the rule of *Allis-Chalmers* and of *Magnuson v. Burlington Northern, Inc., supra,* 576 F.2d 1367. In both *De Tomaso* and *Magnuson* the employer conducted an investigation of the employee's suspected misconduct, as required by the collective bargaining agreement. In both cases the employee attempted to sue for intentional infliction of emotional distress based on employer actions arising from the conduct or the result of that investigation. (*In Magnuson,* the employee alleged a conspiracy to cover up supervisory negligence by making him a scapegoat; in *De Tomaso* the employee complained of wrongful termination and a false accusation that he was a thief.) In both cases the court held the subject of the suit had a substantial relationship to the collective bargaining agreement. (576 F.2d at pp. 1369-1370; 43 Cal.3d at pp. 528-529.) *De Tomaso* holds a tort claim will be preempted unless it is based on facts either "unrelated to matters expressly or impliedly governed by the collective bargaining agreement" or which "so far exceed the scope of

reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim." (43 Cal.3d at p. 529 [footnote omitted].)

Nahm's case avoids preemption under either prong of the *De Tomaso* test. Unlike the causes of action grounded directly in investigations, discipline imposition or other matters rooted in the collective bargaining agreement, Nahm's allegations of personal abuse – which are in no way related to her later termination – are not clearly related to imposition of discipline under the collective bargaining agreement. Even if they are, they are sufficiently outrageous to escape preemption under the second prong. Indeed, in the omitted footnote to the passage just quoted, the *De Tomaso* court acknowledges preemption was defeated in one case where "the distress was based on a continual and egregious pattern of harassment by the employer." (See *Pikop v. Burlington Northern R. Co.* (Minn. 1986) 390 N.W.2d 743, cert. den. *sub nom. Burlington Northern R. Co. v. Gulati* (1987) 107 S.Ct. 1616.) *Pikop*, cited by our high court with evident approval, holds that because a state "has a strong interest in protecting its citizens from outrageous emotional abuse," federal law does not preempt "a state-law claim of intentional infliction of emotional distress where the alleged distress results, not from wrongful discharge, but from a continual pattern of harassment on the part of the . . . employer." (390 N.W.2d at p. 753.)

We conclude that Nahm's cause of action for emotional distress is not preempted by federal law.

The remaining question is whether Nahm was required to exhaust remedies under the grievance-arbitration provisions of the collective bargaining agreement before she could bring her action in superior court.

"It is well established that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing such exhaustion. [Citations.] [¶] . . . '[T]his rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Citation.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies.' " (*Johnson v. Hydraulic Research & Mfg. Co., supra,* 70 Cal.App.3d at pp. 679-680.) This California rule is consistent with the strong federal policy in favor of arbitration of labor disputes under existing collective bargaining agreements. (Cf., e.g., *Steelworkers v. American Mfg. Co., supra,* 363 U.S. at p.

568; *Steelworkers v. Warrior & Gulf Co., supra,* 363 U.S. at p. 581; *Republic Steel v. Maddox* (1965) 379 U.S. 650, 652-653.)

Defendants contend that every one of Nahm's allegations "arguably constitutes a breach of the collective bargaining agreement" and therefore that respondent court "will be forced to interpret the collective bargaining agreement . . . . Thus, the allegations contained in the complaint are inextricably intertwined with the collective bargaining agreement." "Nahm has chosen to disguise her dissatisfaction with the collective bargaining agreement as an action for intentional infliction of emotional distress. In truth, her complaint is an all-out assault on the collective bargaining process and arbitration of employment disputes."

If valid these contentions would tend to satisfy the exhaustion doctrine's requirement that the dispute be within the scope of the contract. But the contentions impermissibly distort Nahm's complaint which, in our view, plainly alleges a course of conduct intentionally undertaken for the purpose of inflicting emotional distress upon Nahm. Undeniably the collective bargaining agreement will be implicated, but only as it may have been used or disregarded in the course of the alleged "episodes and encounters designed to harass, humiliate and upset plaintiff." This is not a situation in which (as in cases on which defendants rely) a plaintiff has by "artful pleading" undertaken to disguise an alleged wrongful discharge or other direct violation of a collective bargaining agreement in tort rhetoric. This is a legitimate tort complaint. In terms of the policies underlying the exhaustion doctrine, it is too late in this case to hope for a simple, expeditious and yet adequate disposition of

Nahm's complaints or "to foster more harmonious employee-employer relations." Nahm is no longer an employee, and the relief which might have been available to her, as an employee, by way of the arbitration procedure – correction of allegedly improper entries in her personnel file, for example – would be all but meaningless, to her or to the labor-management relationship at Alpha Beta, now.

We conclude that the elements of the exhaustion doctrine have not been demonstrated and that, in any event, the doctrine is inappropriate to the circumstances of record.

The alternative writ of mandate is discharged. The petition for a peremptory writ of mandate is denied.

King, J.

We concur:

Low, P. J.

Haning, J.

A025458

Trial Court: Alameda County Superior Court

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APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 5, No. A025458
S005134

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

ALPHA BETA INC. et al., Petitioners,

v.

SUPERIOR COURT OF THE
COUNTY OF ALAMEDA, Respondent;
NAHM, Real Party in Interest.

(Filed June 23, 1988)

Petitioners' petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed February 26, 1988, which appears at 198 Cal.App.3d 1390. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

/s/ Lucas
Chief Justice

APPENDIX C

Rule 976. Publication of Appellate Opinions

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(c) [Publication procedure]

(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so

certified shall be published, on an order of the Supreme Court to that effect.

(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.

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Rule 977. Citation of Unpublished Opinions Prohibited; Opinions Ordered Published by Supreme Court

(a) [Unpublished Opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is revelant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

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Rule 978 Requesting Publication of Unpublished Opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceeding not joining therein, stating concisely why the opinion meets one or more of the publication standards. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested pulication.

(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.